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No. 82-76

IN THE

Supreme Court of the United States

October Term, 1981

PHILIP S. SHAPIRO,

Petitioner,

versus

HON. LAWRENCE COOKE, Chief Judge, HON. MATTHEW I. JASEN, HON. DOMENICK GABRIELLI, HON. HUGH R. JONES, HON. SOL WACHTLER, HON. JACOB D. FUCHSBERG, HON. BERNARD S. MEYER, Associate Judges, as the Court of Appeals of the State of New York,

Respondents.

REPLY BRIEF

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Dated: Albany, New York
September 1, 1982

Issues Presented.

I. Under the doctrine of comity, an individual bar admission determination of a State's highest court is reviewable only by writ of certiorari from this Court.

II. A secretive and arbitrary pattern of recognizing or rejecting the legal experience of identically-qualified applicants for bar admission on motion is unconstitutional.

III. The Petition was timely filed.

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Respondents.

REPLY BRIEF.

Statement of the Case.

The Petitioner requested that the Respondents waive their State-of-Admission Practice Rule (see Petition, p. 5) and recognize the Petitioner's legal service in and for the State of New York so that he might qualify for admission

to the New York bar on motion. After the Respondents denied the request, the Petitioner sought reconsideration, which was also denied. The Petitioner thereupon, on July 13, 1982, petitioned this Court to review the Respondents' determination. In a separate proceeding, the Petitioner, as a member of the class of New York State-employed attorneys, has challenged the constitutionality of the State-of-Admission Practice Rule insofar as it precludes the recognition of their New York State service for the purpose of qualifying for admission on motion.

The Respondents' Brief in Opposition asserts that certiorari should not lie because: (1) There are purported State remedies available to the Petitioner; (2) Where applicants are *identically qualified,* the Respondents may arbitrarily grant or deny waiver of the State-of-Admission Practice Rule in secrecy; and (3) The Petition was allegedly filed out of time.

This Reply Brief responds to those claims.

Statement of Facts.

The facts of the case are presented at pages 3-9 of the Petition. The Respondents' Brief in Opposition contains two factual misstatements. First, contrary to the statement at Respondents' Brief, page 5, David A. Schlissel, Esq., an Intervenor Attorney with the State Consumer Protection Board, was not admitted on motion, but was required to retake the New York bar examination. Messrs. Reed and Cowan, of the State Public Service Commission, however, were permitted to be admitted on motion.

Secondly, the Respondents claim, in a footnote on page 13 and also on page 17, that the Petitioner has challenged

their "denial of his admission" in a suit instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the Northern District of New York. This is incorrect. As the prayer to the Complaint (quoted at Respondent's Brief, p. 5) clearly states, the Petitioner's suit only challenges the constitutionality of the State-of-Admission Practice Rule as applied to the class of New York State-employed attorneys, and does not seek a review of the Respondents' refusal to waive the Rule on behalf of the Petitioner.

ARGUMENT.

I.

Under the doctrine of comity, an individual bar admission determination of a State's highest court is reviewable only by writ of certiorari from this Court.

Even when a State's highest court asserts that its refusal to grant an individual's bar admission request is a ministerial act, this Court has deemed such action to be an exercise of judicial power reviewable by this Court. *In re Summers,* 325 U.S. 561, 565-566 (fn. 6) and 568-569 (1945); *Doe v. Pringle,* 550 F.2d 596, 599 (CA 10, 1976), *cert. denied* 431 U.S. 916 (1977); *but cf. Feldman v. Gardner,* 661 F.2d 1295 (CADC, 1981), *cert. granted sub nom., District of Columbia Court of Appeals v. Feldman,* ____ U.S. ____ , 102 S. Ct. 3481, 50 L.W. 3998.09 (June 28, 1982) (No. 1335, 1981 Term).*

*In *Feldman,* this Court will resolve a deep split in the circuits over which Federal court forum has jurisdiction to review state court bar admission denials. It is respectfully submitted that a review of the instant case in tandem with *Feldman* might reduce the volume of such litigation by comprehensively setting forth the Federal rights and remedies attaching to the interstate migration of attorneys.

There is a "subtle but fundamental distinction" between the two types of claims which a bar applicant may bring to Federal courts when he believes a State's highest court has unconstitutionally refused to waive on his behalf a rule which he also believes to be unconstitutional. The *rule* may be challenged by suit under 42 U.S.C. §1983; however, review of the State court's adjudication of his *particular application* for waiver may *only* be had by writ of certiorari from the United States Supreme Court. *Doe v. Pringle,* 550 F.2d at 597.

The Respondents' Brief, at pages 10-11, asserts that the Petitioner could obtain relief from the challenged denial in the State's court system under New York Civil Practice Law and Rules Section 1026 (quoted at Resp. Brief, p. 7); however, as that statute plainly indicates, its application is only to questions arising under New York Judiciary Law, Article 7-A (Sections 210-235), which pertain to various aspects of judicial administration, such as judicial reassignments. Bar admission rules are promulgated under Article 4 of the New York Judiciary Law (here Section 90(1) (b)). Thus, New York Civil Practice Law and Rules Section 1026 offers no remedy to the Petitioner. The case of *Morganthau v. Cooke,* 56 N.Y. 2d 24 (1982), upon which the Respondents rely, solely involved issues arising under New York Judiciary Law Article 7-A and is therefore inapposite.

The Respondents also incorrectly claim that three cases, *Gordon v. Committee on Character and Fitness,* 48 N.Y. 2d 266 (1980), *Matter of Pirie,* 64 A.D. 2d 110, 408 N. Y. S. 2d 511 (1st Dept., 1978), and *Fleming v. Court of Appeals,* 450 U.S. 902 (1981), support their proposition that certiorari does not lie here. Since the *Gordon* and *Pirie* cases did not challenge determinations made by the State's

highest court, certiorari was not available to the bar-applicants involved.* In the *Fleming* case, certiorari was "available," but not granted; hence, *Fleming* has no precedential value.

II.

A secretive and arbitrary pattern of recognizing or rejecting the legal experience of identically-qualified applicants for bar admission on motion is unconstitutional.

In *Schware v. Board of Examiners,* 353 U.S. 232, 239 (1957) and *Konigsberg v. State Bar of California,* 353 U.S. 252, 273 (1957), this Court declared that equal protection and due process safeguards apply to bar admission procedures. (See Petition, pp. 9-10). The Respondents, nevertheless, insist that they may discriminate between *identically qualified* applicants for admission on motion (Resp. Brief, p. 15). They further assert that one bar applicant has no right to know of identical applicants' success or failure in seeking waivers of the State-of-Admission Practice Rule, even where that information is voluntarily disclosed by the other applicants.

For the reasons set forth at Petition pages 9-15, discrimination between two identically-qualified bar applicants is unconstitutional. Additionally, there is no basis for the Respondents' claim to a privilege to keep secret

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*_Pirie,_ however, is useful for illustrating the New York distinction between "legal competence" and "fitness of character." The State-of-Admission Practice Rule, which is the subject of the case at bar, is solely intended to recognize legal competence (Respondents' Brief, Appendix p. A14, ¶3), not fitness of character. In *Pirie,* the applicant's fitness of character was in no way impugned by his preceding practice of law in the State of New York for four years while admitted only in the Commonwealth of Massachusetts. 408 N.Y.S. 2d at 512-513.

evidence of such discrimination which has been voluntarily disclosed by other bar applicants. The authority upon which the Respondents rely for the asserted privilege is New York Judiciary Law, Article 4, Section 90 (10) (quoted at Resp. Brief, pp. 9-10). This statute sets forth the responsibilities of a different court, the State Supreme Court, Appellate Division, for protecting the confidentiality of bar admission and disciplinary records. The statute unambiguously indicates that the confidentiality interest there recognized is in "the persons or attorneys to be affected [by disclosure]" (*Id.*) rather than in the judiciary.

The plain objective of the statute is to restrain arbitrary government power. The suggestion that the statute also confers upon government a shield against judicial or public inquiry into the possible abuse of power is both inconsistent with the tenor of the statute and contrary to public policy.* As the New York Court of Appeals has itself held,

> "[t]he function of publicity, . . ., as an 'effective restraint on possible abuse of judicial power' is, indeed, one of the fundamental safeguards of a free society. [Citations Omitted]" *Matter of New York Post Corporation v. Leibowitz*, 2 N.Y. 2d 677, 682 (1957)

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*See: Francis E. Rourke, Secrecy and Publicity: Dilemmas of Democracy; The John Hopkins Press (Baltimore, Maryland, 1961), pp. 24-25, 100-106.

III.

The Petition was timely filed.

A petition for writ of certiorari should only be filed when no further relief may be granted by a State's highest Court.

As indicated in the Petition, at page 7, the initial waiver request of William Cowan, Esq., was denied. He then requested reconsideration, citing the favorable ruling of the Respondents in the case of the waiver request of Robert Reed, Esq. (*Id.*) Upon *reconsideration,* the Respondents granted Mr. Cowan's request for a waiver of the State-of-Admission Practice Rule.

Since a reconsideration practice both exists and is effective, it is clear that Petitioner's right to petition for certiorari did not ripen until the Respondents, on April 20, 1982, rejected his request for reconsideration.* Indeed, the text of the April 20 notification (Petition, Appendix, p. A-1) does not indicate that the Petitioner's papers were inappropriate. Instead, the letter explicitly states that the underlying reconsideration request had been denied.

Conclusion.

For the reasons set forth in the Petition and herein, the Petition should be granted and the Court should direct the

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*The authority for this reconsideration practice is found in New York Civil Practice Laws and Rules, Sections 101, 2211, and 2217. (Appendix, p. RA-1) In addition, the Respondents' own Rules of Practice explicitly provide for consideration of motions for the reargument of appeals and motions. Rule 500.9(f) (*Id.*). Regardless, there is no barrier to a renewed request for admission to the bar.

Respondents to issue an order certifying that the Petitioner's five years of legal experience satisfies the legal competency qualification for admission to the New York bar on motion.

Respectfully submitted,

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APPENDIX.

New York Civil Practice Law and Rules

Section 101. Short title; application

* * *

The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute.

* * *

Section 2211. Application for order; when motion made

A motion is an application for an order.

* * *

Rule [Section] 2217. Prior motion; *ex parte* motion; transfer of motion

(a) Prior motion. Any motion may be referred to a judge who decided a prior motion in the action.

(b) Affidavit on *ex parte* motion. An *ex parte* motion shall be accompanied by an affidavit stating the result of any prior motion for similar relief and specifying the new facts, if any, that were not previously shown.

* * *

New York Code of Rules and Regulations, Title 22 [Judiciary], Rule 500 [Rules of Practice of the New York Court of Appeals]

Rule 500.9

* * *

(f) *Reargument of appeals and motions.* (1) The motion shall be made without oral argument on 10 copies of a brief or memorandum, reproduced in conformity with section 500.1 of this Part, which shall state briefly the ground upon which reargument is asked and the points claimed to have been overlooked or misapprehended by the court, with proper reference to the particular portions of the record and to the authorities relied upon.

(2) On reargument of motions, a single brief or memorandum may be filed if that was the requirement on the original motion.

(3) The motion may not be based on the assertion for the first time of new points except for extraordinary and compelling reasons. Unless otherwise permitted by the court, the notice of motion shall be served not later than 30 days after the appeal or motion has been decided. Three copies of the brief or memorandum shall be served on the adverse party with the notice of motion.

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